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3
4 No. 48365-3-II
5 COURT OF APPEALS, DIVISION TWO
6 OF THE STATE OF WASHINGTON

7
8 Skamania County Superior Court nos.
9 13-1-00092-8

10 STATE OF WASHINGTON,
11 Respondent

12 vs.

13 STEVEN PESCHL,
14 Appellant

15 BRIEF OF RESPONDENT
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18

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STATE’S RESPONSE TO
APPELLANT’S CLAIMS

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I. FACTS

Steven Peschl, the appellant, was charged in Skamania County Superior Court, by information on November 9, 2013, with the crimes of Burglary in the Second Degree and Theft in the Third Degree. The appellant waived Jury trial and was convicted at bench trial on November 24, 2015.

The Court heard the following testimony. Wayne Martin, a long time local resident observed a shadow within a fenced area owned by the County of Skamania. In returning, to observe the area further, Mr. Martin saw an individual leave the fenced area and walk across the road to an area next to another county building. Mr. Martin then contacted the Skamania County Sheriff's Office. (RP 11/24/2015 at 6-8). Deputies Jay Johnston and Chris Helton responded to the report and contacted The appellant at the location reported by Mr. Martin as the location the individual had traveled when leaving the fenced area. (RP 11/24/2015 at 14, 17, and 35). Dep. Johnston testified that The appellant came out from behind the County Motor Pool building where The appellant's truck was parked. (RP 11/24/2015 at 17). Dep, Johnston testified that the appellant stated that he had run out of fuel and was filling up with fuel he had purchased at a Jiffy Mart. (RP 11/24/2015 at 20) Dep. Johnston testified that he observed a red gas jug and red tubing consistent with a fuel siphon. (RP 11/24/2015 at 20, 22, and 24-25). Dep. Johnston testified that The appellant's truck as filled with metal items consistent with those stored in the Motor Pool building where the truck was located. RP 11/24/2015 at 25-27). Dep. Johnston testified that in walking through the Motor Pool building he observed trucks belonging to Public Works, and in

1 looking at the fuel doors, located red material consistent with the “siphon hose”
2 possessed by The appellant, on the fuel door flapper. (RP 11/24/2016 at 25-
3 28). Dep. Helton testified that he contacted The appellant near his vehicle on
4 the north side of the Motor Pool building consistent with where Mr. Martin saw
5 the individual run across the road from the enclosed fenced area. (RP
6 11/24/2015 at 35). Dep. Helton testified that The appellant had a red gas can
7 and red tubing. (RP 11/24/2016 at 36). Dep. Helton testified that he went to
8 investigate the fenced area where someone was originally scene, which gave
9 rise to the call. (RP 11/24/2015 at 38). Dep. Helton testified that the fenced
10 area was completely enclosed. (RP 11/24/2015 at 38-39). Dep. Helton
11 testified that he entered the fenced area with his key and smelled the odor of
12 gasoline in the air and observed a fuel funnel/spout sitting on the rail of one of
13 the county vehicles in the fenced area. (RP 11/24/2015 at 40). Dep. Helton
14 testified that he did not observe a puddle or spilled gasoline. (RP 11/24/2015 at
15 40).. Dep. Helton testified that he took the funnel/spout and it fit upon the red
16 gas can possessed by The appellant. (RP 12/24/2015 at 41). Dep. Helton
17 testified that he observed bleachers and other metal items in The appellant’s
18 truck consistent with the metal items stored at the Motor Pool building and that
19 there were metal items in the midst of being transported from there resting
20 location based upon Dep. Helton’s Observations of the disturbance to the grass
21 and the dew on the grass. (RP 11/24/2015 at 42-43). Don Clack testified that
22 he was the Facilities Maintenance Manager for Skamania County Buildings and
23 Grounds. (RP 11/24/2016 at 45). Mr. Clack testified that his office is located
24 at the Motor Pool building where The appellant was contacted by law

1 enforcement and where the Metal items were stored as well as trucks belonging
2 to the Buildings and Grounds Department. (RP 11/24/2016 at 46). Mr. Clack
3 testified that The appellant had worked for the County and had worked for Mr.
4 Clack in the past. (RP 11/24/2015 at 47). Mr. Clack testified at the time of
5 the incident that The appellant did not have permission to take anything from
6 the Motor Pool building. (RP 11/24/2015 at 47). Mr. Clack testified that the
7 metal items located in the appellant truck were items stored in the attached
8 shed building of Motor Pool building and belonged to Skamania County. (RP
9 11/24/2015 at 47-50). Mr. Clack testified that the Skamania County had
10 purchased these items and they had at least scrap value. (RP 11/24/2015 at
11 48). Clay Moser testified that he was the Skamania County Road
12 Maintenance Superintendent and that his offices are in buildings in the fenced
13 off area where a shadow was initially seen and the funnel/spout was discovered
14 by Dep. Helton. (RP 11/24/2015 at 52). Mr. Moser testified that the area
15 within the fenced area falls under his responsibility. (RP 11/24/2015 52-53).
16 Mr. Moser testified that the fenced area was completely enclosed and that the
17 appellant did not have permission to enter that area or possess anything located
18 within that fenced area. (RP 11/24/2015 at 53-55). Further, exhibits were
19 entered consisting of 2-11 which are photos of the scene and exhibit 12 which
20 is a map of the county shops. Exhibit 12 has annotations written on it by the
21 witnesses indicating the following: "X" indicating where shadow observed by
22 Wayne Martin (RP 11/24/2015 at 12-13); "W" indicating Mr. Martin's
23 location after returning to observe the area (RP 11/24/2015 at 13) ; A dotted
24 line indicating where Mr. Martin observed a person walk from the fenced area

1 to the motor pool building (RP 11/24/2015 at 14); “V” indicating where law
2 enforcement contacted The appellant at his truck (RP 11/24/2015 at 17-18);
3 “T” indicating where the trucks were located in the shed building of the Motor
4 Pool (RP 11/24/2015 at 27-28); “P” indicating where the pile of metal parts
5 were located (RP 11/24/2015 at 29-30); “Fenced Area” indicating the totally
6 enclosed fenced area belonging to the Road maintenance Department (RP
7 11/24/2015 at 38-39); “F” indicating the location of discovery of the
8 funnel/spout by Dep. Helton (RP 11/24/2015 at 40-41); and “R” indicating the
9 location of the fire ring (RP 11/24/2015 at). (Exhibits 2-12).

10 **II. APPELLANT’S ASSIGNMENT OF ERROR**

- 11 1. The evidence presented at bench trial does not support conviction for
12 Burglary in the Second Degree under a sufficiency of the evidence
13 analysis.
- 14 2. Trial Counsel provided ineffective assistance by failing to argue the
15 appellant committed the crime criminal trespass.
- 16 3. The failure to file findings of fact and conclusions of law after bench trial
17 require remand to the trial court for entry of finding of fact and
18 conclusions of law pursuant to CrR 6.1.

19 **III. RESPONSE TO APPELLANT’S CLAIMS**

- 20 1. The evidence presented at trial is sufficient to establish a rational trier of
21 fact could have found beyond a reasonable doubt that the appellant
22 committed the crime of Burglary in the Second Degree.

- 1 2. Trial counsel's failure to raise the issue of criminal trespass was
2 consistent with the general denial defense put forward and the
3 statement of the defendant as presented at trial that he had merely
4 stopped at that location for the sole purpose of filling his vehicle with
5 fuel.
6 3. A filing of Findings of Fact and Conclusions of Law is required under
7 CrR 6.1 and as such should be done by the trial court.
8

9
10 **IV. ARGUMENT**

11 **1. Sufficiency of the Evidence**

12 The court reviews the question of sufficiency of the evidence to
13 determine "whether any rational trier of fact could have found the elements of
14 the crime beyond a reasonable doubt." State v. McKague, 172 Wn.2d 802,
15 805, 262 P.3d 1225 (2011). The court should assume the truth of the state's
16 evidence, State v. Mines, 163 Wn.2d 387, 391, 179 P.3d 835 (2008), view
17 reasonable inferences from the evidence in the light most favorable to the state,
18 id., and deem circumstantial and direct evidence equally reliable, State v.
19 Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

20 Pursuant to WPIC 60.04 Burglary in the Second Degree - Elements
21 the state would need to prove the following elements beyond a reasonable
22 doubt to convict the defendant:

- 23 (1) That on or about November 9, 2015, the defendant entered or remained

1 unlawfully in a building;

2 (2) That the defendant acted with knowledge that the motor vehicle had been
3 stolen;

4 (3) That the entering or remaining was with the intent to commit a crime against
5 a person or property therein; and

6 (4) That this act occurred in the State of Washington.

7 Pursuant to WPIC 2.05 Building has the following definition(s):

8 Building, in addition to its ordinary meaning, includes any [dwelling] [fenced
9 area] [vehicle] [railway car] [cargo container]. [Building also includes any other
10 structure used [mainly] [for lodging of persons] [for carrying on business
11 therein] [for the use, sale or deposit of goods]].

12 At trial the court heard testimony that a shadow was seen in a
13 completely enclosed fenced area belonging to Skamania County. Further, a
14 person was observed leaving that totally enclosed fenced area and traveled
15 across the road to the north side of the Skamania County motor pool building,
16 used by Skamania County Buildings and Grounds Department. The motor
17 pool building has a shed roof building that is partially fenced and is used to
18 store trucks and scrap metal. Dep. Johnston and Dep. Helton, in responding to
19 the call, contacted The appellant at the location where the person coming from
20 the fenced enclosure was seen walking to, on the north side of the motor pool
21 building. Dep. Johnson saw The appellant coming from behind the motor pool
22 as he arrived on scene. The appellant was in possession of a gas jug or tank
23 and a rubber hose. The rubber hose was consistent with a siphon used to

1 remove gas from vehicles. The appellant admitted to being out of fuel and had
2 stopped at that location to fill his vehicle with fuel he had purchased at a store.
3 The appellant's truck was filled with metal items consistent with the scrap metal
4 items stored in the shed roof building of the motor pool building. The metal
5 items in the back of The appellant's truck were identified as belonging to
6 Skamania County and The appellant did not have permission to possess the
7 metal items belonging o Skamania County nor did he have permission to be
8 inside the shed building where the metal items and trucks were stored. Dep.
9 Johnson observed red tube material consistent with the siphon hose in the gas
10 flapper of the Skamania County vehicles parked in the shed roof building of the
11 motor pool building. Dep. Helton observed that a metal fire ring had been
12 moved from its location in the shed building of the motor pool and observed
13 disturbed grass and dew indicating that had been dragged to it's current
14 location. Dep. Helton in investigating the completely enclosed fenced area
15 smelled the strong odor of gas in the air and discovered a gas funnel/spout on
16 one of the vehicles in the enclosed are. Dep. Helton took the funnel/spout to
17 the where The appellant was contacted and found that the funnel/spout fit the
18 gas can that The appellant was in possession of. The totally enclosed fenced
19 area is maintained by the Skamania County Road maintenance Department and
20 The appellant had no authority of permission to be inside that area or to
21 possess anything belonging to the road maintenance Department.

22 The evidence, when construed in a light most favorable to the state,
23 where the truth of the evidence is presumed, and direct and circumstantial
24 evidence is deemed equally reliable, creates a compelling fact pattern

1 establishing a basis to infer that The appellant was inside the enclosed fence
2 area and had attempt or had siphoned gas from the tank of a vehicle there and
3 had crossed over to the motor pool building and was in the process of taking
4 metal scrap from the shed roof building as well as siphoning fuel from the
5 vehicles stored there. Both instances of unlawful entry into buildings and the
6 apparent attempt to steal fuel or the actual theft of fuel and scrap establish a
7 basis for Burglary in the Second Degree.

8 The evidence presented at trial form a valid basis for a rational trier of
9 fact to find beyond a reasonable doubt that the appellant committed the crime
10 of Burglary in the Second Degree.

11 2. Ineffective Assistance of Counsel

12 A defendant possesses the right to effective assistance of counsel in
13 criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104
14 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The appellant must show that (1)
15 defense counsel's representation was deficient, falling below an objective
16 standard of reasonableness, and (2) the deficient performance prejudiced the
17 defendant. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). If
18 one prong fails, the court need not address the other prong. State v. Staten, 60
19 Wn.App. 163, 171, 802 P.2d 1384 (1991). The must presume counsel was
20 effective. State v. McFarland, 127 Wn.2d 322, 335, 889 P.2d 1251 (1995).
21 Further, the appellant must show no legitimate strategic or tactical reason exists
22 for his trial counsel's actions. Sutherby, 165 Wn.2d at 883. Prejudice exists if
23 by a reasonable probability the outcome would be different "but for counsel's
24 unprofessional errors." State v. Neff, 163 Wn.2d 453, 466, 181 P.3d 819

(2008).

Here, the appellant asserted a general denial. Further, the appellant had made statements to law enforcement to explain his presence at that location. Trial counsel's decision not to concede an element at trial held the State to its burden on that element and was consistent with the appellant's position that he was there by happenstance and nothing to do with the observed and apparent unlawful entries into the totally enclosed fenced area or the fenced shed building. Trial counsel's decision to not present that argument had a legitimate strategic basis and held the State to its burden and would not have changed the outcome of the trial as the finder of fact was satisfied as to all the elements and conceding an element would not have changed that finding.

3. Findings of Fact and Conclusions of Law

CrR 6.1 mandates that after a trial without jury the court shall enter findings of fact and conclusions of law. While the trial court made oral findings and conclusions this does not meet the requirements of CrR 6.1. (RP 11/24/2016 at 73-76). CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial. The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal. *City of Bremerton v. Fisk*, 4 Wash.App. 961, 962, 486 P.2d 294 (1971), disapproved on other grounds by *State v. Souza*, 60 Wash.App. 534, 805 P.2d 237 (1991); cf. *State v. McGary*, 37 Wash.App. 856, 861, 683 P.2d 1125 (1984) (JuCR 7.11); *State v. Stock*, 44 Wash.App. 467, 477, 722 P.2d 1330 (1986) (CrR 3.6). *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187

1 (1998). The court in Head addressed a finding of guilty on eight counts of First
2 Degree Theft where the trial court, much like this court, made oral findings but
3 no written findings were filed. The court in Head found remand for entry of
4 written findings and conclusions is the proper course. A trial court's oral opinion
5 and memorandum opinion are no more than oral expressions of the court's
6 informal opinion at the time rendered. State v. Mallory, 69 Wash.2d 532, 533,
7 419 P.2d 324 (1966). An oral opinion "has no final or binding effect unless
8 formally incorporated into the findings, conclusions, and judgment." Id. at 533-
9 34, 419 P.2d 324; accord State v. Dailey, 93 Wash.2d 454, 458-59, 610
10 P.2d 357 (1980). State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998).
11 The state concedes the point and agrees that Findings of Fact and Conclusions
12 of law should be entered. Presentment of Findings of Fact and Conclusions of
13 Law is currently set in the underlying matter for August 25, 2016.

14
15 **V. CONCLUSION**

16 The state respectfully submits that the evidence elicited at trial forms a firm
17 basis for a rational trier of fact to find beyond a reasonable doubt that the
18 appellant committed the crime of Burglary in the Second Degree. Further, that
19 trial counsel's decision not to conceded the element of trespass at trial had a
20 legitimate strategic purpose and to have made the concession would not have

21 ///

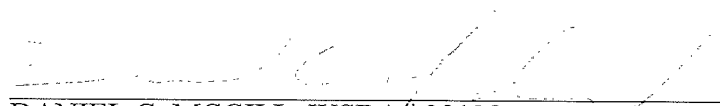
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1 had a reasonable probability of effecting the outcome of the trial. Further,
2 Findings of Fact and Conclusions of law should be entered based upon the
3 bench trial conducted at the trial level.

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5 RESPECTFULLY SUBMITTED this 3 day of AUGUST, 2016.

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9 Skamania County Deputy Prosecuting Attorney
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24 STATE'S RESPONSE TO
25 APPELLANT'S CLAIMS
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SKAMANIA COUNTY PROSECUTOR

August 03, 2016 - 10:59 AM

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